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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is an action brought in state court properly removed to federal court, as one "arising under" the laws of the United States pursuant to 28 U.S.C. § 1441, where the subject matter of the complaint is preempted by federal law?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to this proceeding.[1]

[1] Kerr-McGee Chemical Corporation is a wholly-owned subsidiary of Kerr-McGee Corporation. The following are affiliates of Kerr-McGee Chemical Corporation: Bikita Minerals (Private), Ltd. and Basic Management, Inc.

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IN THE

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OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Kerr-McGee Chemical Corporation prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 4, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, together with the opinion in the case consolidated with this action on appeal, is reported at 677 F.2d 571 and appears in the appendix hereto at page A 1. The unreported opinion of the District Court for the Northern District of Illinois appears in the Appendix at page A 25.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1982. A timely petition for

rehearing en banc was denied on August 2, 1982. (A. 30). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved are set forth in the appendix accompanying this petition: Article VI, clause 2 of the United States Constitution (A. 64); 28 U.S.C. § 1441 (A. 64); and relevant sections of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (A. 64).

STATEMENT OF THE CASE

This action involves a facility in West Chicago, Illinois, licensed by the Nuclear Regulatory Commission ("NRC") pursuant to the Atomic Energy Act, 42 U.S.C. § 2011. Kerr-McGee Chemical Corporation ("Kerr-McGee") acquired the facility as a result of its merger with American Potash and Chemical Corporation in 1967. From the 1930's until 1973, when the facility shut down, the plant processed low level radioactive ores for various purposes, including use by the United States government in atomic energy projects. The facility was first licensed by the Atomic Energy Commission ("AEC") in 1956 and has remained continuously under license by the NRC. As a consequence of forty years of processing and storing thorium and radioactive ores, the facility contains large quantities of mill tailings contaminated with low-level radioactivity which must be stabilized before the facility may be decommissioned pursuant to NRC regulations and licensing procedures. The decommissioning proceedings for this facility are currently in progress before the NRC.

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[2] The action of a circuit court of appeals directing a remand to a state court is reviewable in this Court. *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U. S. 464 (1947).

Although the regulation of the field of radioactive hazards has been occupied by federal law and regulations,[3] the State of Illinois (the "State") filed this action in the Circuit Court of DuPage County, Illinois, alleging that the presence of mill tailings at the inoperative Kerr-McGee facility violates state pollution control statutes and regulations pertaining generally to the disposal of wastes. Though the complaint ostensibly is aimed at non-radioactive hazards, the allegations and relief sought are directed at the federally licensed and regulated mill tailings at the facility. (A. 33). The State complaint seeks to regulate the radioactive wastes by ordering them moved outside West Chicago (A. 35), but the NRC draft environmental impact statement relating to this facility, issued in May, 1982, recommends that the wastes be encapsulated on the present facility site. (NUREG-0904).

Kerr-McGee removed this action to the United States District Court for the Northern District of Illinois, pursuant to 28 U. S. C. § 1441, on the ground that federal law preempted the subject matter of the State's claim and, therefore, since federal law supplants state law in this area the complaint "arises under" federal law. (A. 53). The State moved to remand this action to state court. Chief Judge McGarr denied the State's motion, holding that: 1) the regulation of radioactive

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[3] As the Seventh Circuit decision acknowledged, the Atomic Energy Act, 42 U. S. C. § 2011, from its inception, recognized the regulation of radioactivity "as the exclusive province of the federal government." (A. 14). That act created "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency." *Siegel* v. *AEC*, 400 F. 2d 778, 783 (D. C. Cir. 1968). Federal preemption of the regulation of radioactive materials is necessitated by the unique nature of the subject matter and the need for uniformity of regulation. *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143, 1153-54 (8th Cir. 1971), *aff'd mem.*, 405 U. S. 1035 (1972); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976).

materials by the State is preempted by federal law;[4] and, 2) removal of the case on the basis of federal preemption was proper. (A. 25). Summary judgment was then granted on the ground that the Nuclear Regulatory Commission is the agency entrusted with the authority to regulate the disposal of radioactive materials at the Kerr-McGee facility.

On May 4, 1982, the Seventh Circuit, without considering the preemption issues, reversed the district court's decision on removal and directed a remand to the state court. The Court of Appeals held that even where the state law is wholly preempted by federal law, the claim does not "arise under" federal law because "federal preemption is merely a defense to state law claims." (A. 11).

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[4] Although section 274 of the Atomic Energy Act (42 U. S. C. § 2021) establishes procedures whereby states may assume certain specified responsibilities otherwise within exclusive NRC domain, such an assumption can take place only if a State enters into a "Section 274 Agreement" with the NRC. Since Illinois has never entered into such an agreement, the NRC has surrendered none of its authority to regulate radiological materials in Illinois.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts with the Law of Other Circuits

The courts of appeals are in conflict as to whether or not federal preemption provides a basis for removal of a state court action to federal court. The Seventh Circuit expressly conceded this split in authority:

> Kerr-McGee has cited a number of cases in which removal of suits to federal court was permitted because state law had been preempted. To the extent that these cases are in conflict with our decision here, we decline to follow them.

(A. 10).

The decision of the Seventh Circuit is in *direct* conflict with the law of at least two other circuits. Cases from the Second and Sixth circuits hold that federal preemption, rather than a mere "defense" to state law claims, represents a supplanting of state law with federal substantive law in the field. Thus, a plaintiff's right to relief in those instances is determined exclusively under federal law and the action is removable.

The Second Circuit has held that removal of a claim for losses against an air carrier is appropriate since the regulation of common carriers has been preempted by the federal government. In *North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F. 2d 229 (2d Cir. 1978) the court recognized:

> Congress has created a broad, comprehensive scheme covering the interstate shipment of freight, aimed at preventing preferential treatment among shippers and establishing national equality of rates and services. This has occupied the field to the exclusion of state law. . . . The allegations of appellant's complaint show that its claim is based upon the loss of goods during interstate transportation by appellee as a common carrier for hire.

Id. at 233-234. *See also Beech-Nut, Inc.* v. *Warner-Lambert Co.*, 480 F. 2d 801 (2d Cir. 1973).

In *Avco Corp.* v. *Aero Lodge No. 735*, 376 F. 2d 337 (6th Cir. 1967), *aff'd*, 390 U. S. 557 (1968) the Sixth Circuit affirmed removal of a complaint asserting a state law claim because the subject matter of that claim was preempted by federal labor law. Although the plaintiff asserted that the alleged breach of contract was a state law claim, the Sixth Circuit held that § 301 of the Labor Management Relations Act preempts state law and plaintiff had no independent state court rights. Even though § 301 was not referred to in the complaint, removal was held to be proper because federal preemption creates "arising under" jurisdiction. *See also McKinney* v. *International Association of Machinists*, 624 F. 2d 745 (6th Cir. 1980).

In contrast to the rulings of the Second and Sixth Circuits, decisions from the Third and Eighth Circuits hold that federal preemption is merely a defense to a state law claim and not a ground for federal removal jurisdiction. *Trent Realty Associates* v. *First Federal Savings & Loan Association of Philadelphia*, 657 F. 2d 29 (3d Cir. 1981); *Lawrence County* v. *South Dakota*, 668 F. 2d 27 (8th Cir. 1982); and *First National Bank of Aberdeen* v. *Aberdeen National Bank*, 627 F. 2d 843 (8th Cir. 1980). These decisions equate federal occupation of the field with defenses based on federal law and therefore arrive at the mistaken conclusion that removal is improper because the claims do not arise under federal law but are merely affected by it.

The decisions of the Courts of Appeals in these cases provide no analytical basis on which to reconcile this conflict. This split among the circuit courts, therefore, necessitates a grant of certiorari to review this important and often litigated question of federal jurisdiction.

The need for review by this Court is further exemplified by the confused state of the law within the Ninth and Tenth Circuits. Although several cases from the Ninth Circuit have

held that federal preemption provides a basis for removal, other cases from that circuit have taken the opposite view. *Compare: Lafferty* v. *Solar Turbines International,* 666 F. 2d 408 (9th Cir. 1982); *Fristoe* v. *Reynolds Metals Co.,* 615 F. 2d 1209 (9th Cir. 1980); *Sheeran* v. *General Electric Co.,* 593 F. 2d 93 (9th Cir.), *cert. denied,* 444 U. S. 868 (1979); and *Meyers* v. *Beverly Hills Federal Savings & Loan Association,* 499 F. 2d 1145 (9th Cir. 1974), holding that federal preemption provides a basis for removal jurisdiction, *with Nalore* v. *San Diego Federal Savings & Loan Association,* 663 F. 2d 841 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 1719 (1982); *Guinasso* v. *Pacific First Federal Savings & Loan Association,* 656 F.2d 1364 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 1716 (1982); and *Washington* v. *American League of Professional Baseball Clubs,* 460 F. 2d 654 (9th Cir. 1972) holding that federal preemption is a mere defense to state law claims and, therefore, does not provide a basis for removal jurisdiction. This situation within the Ninth Circuit has left the district courts without guidance: "There is a conflict in the cases whether federal preemption alone is a sufficient basis for removal. . . . It is unclear which rationale this circuit follows." *Salveson* v. *Western States Bankcard Association,* 525 F. Supp. 566, 572 (N. D. Cal. 1981).[5]

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[5] District courts within other circuits also have noted the confusion and lack of uniformity surrounding this area of the law. *See e.g. Brown & Sharpe Mfg. Co.* v. *Lodges 1088 & 1142, Int'l Ass'n of Machinists,* 535 F. Supp. 167, 169 n. 1, 170 (D. R. I. 1982) ("The law on the removability of preempted state law claims is currently in disarray. . . . Without appellate instruction, it is not surprising that the decisions of the district courts are in disarray."); *Billy Jack for Her, Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers' Union,* 511 F. Supp. 1180, 1185 n. 6 (S.D.N.Y. 1981) ("the courts are in substantial conflict on this issue [of preemption-based removal]").

The decisions in the Tenth Circuit Court of Appeals are also incongruous. In *North Davis Bank* v. *First National Bank of Layton*, 457 F. 2d 820 (10th Cir. 1972), the court held that a state law claim seeking to prohibit a national bank from establishing a branch office was properly removed because the subject of the litigation had been preempted by federal law. The preemptive law, of necessity, formed "the essential element of the plaintiff's claim." *Id.* at 823. Contrary to *North Davis Bank*, in *Madsen* v. *Prudential Federal Savings & Loan Association*, 635 F. 2d 797 (10th Cir. 1980), *cert. denied*, 451 U. S. 1018 (1981), the Tenth Circuit remanded a state court contract action after finding that the claim was not founded upon federal law and did not require the application of federal law. According to the court, even if federal preemption were established, "it would not confer jurisdiction when it is raised by the *defendant* to defeat a common-law contract claim brought in state court." *Id.* at 801. The Tenth Circuit, however, carefully distinguished and left intact its earlier holding in *North Davis Bank* on the ground that the state court claim there necessarily had its "source" in a federal statute.

The direct conflict among and within the circuit courts as to whether federal preemption supplants state law and creates "arising under" jurisdiction or whether federal preemption is merely a defense to a state law claim requires prompt resolution through the vehicle of a case such as this where the issue is squarely presented without encumbrance of unrelated matters. The issue is frequently litigated because defendants such as Kerr-McGee who operate in an area preempted by federal law and regulation believe that their rights and obligations under that law should be adjudicated in a federal forum. Until this Court clarifies this jurisdictional issue, lower courts and counsel will continue to expend an inordinate amount of time and resources litigating the question. In addition to the conflicting appellate court cases, in the last six years alone the issue of

preemption removal has been considered by more than thirty district court decisions in more than twenty districts.[6]

A writ of certiorari should be granted to resolve the existing conflict among and within the courts of appeals and to reduce the substantial effort currently being expended on this jurisdictional issue in the lower courts.

II.

The Decision of the Court of Appeals Conflicts With Decisions of This Court

A writ of certiorari should be issued to review the decision of the Court of Appeals below because that decision conflicts with prior decisions of this Court. In *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557 (1968), this Court held that a suit purporting

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[6] The following cases have found that federal preemption provides a basis for federal question jurisdiction: *Alameda Room, Inc.* v. *Pitta*, No. 81 Civ. 7710 (S.D.N.Y., May 13, 1982); *Palm Beach Co.* v. *Journeymen's Local 157*, 519 F.Supp. 705 (S.D.N.Y. 1981); *Billy Jack For Her, Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers' Union*, 511 F.Supp. 1180 (S.D.N.Y. 1981); *Louisiana ex rel. Guste* v. *Fedders Corp.*, 524 F.Supp. 552 (M.D.La. 1981); *Johnny's Pizza House, Inc.* v. *G & H Properties, Inc.*, 524 F.Supp. 495 (W.D.La. 1981); *Salveson* v. *Western States Bankcard Ass'n*, 525 F.Supp. 566 (N.D.Cal. 1981); *Glass Bottle Blowers Ass'n* v. *Certain-teed Corp.*, 93 CCH Lab. Cas. ¶ 13,335 (M.D.Ga. 1981); *United Transp. Union* v. *Consolidated Rail Corp.*, 90 CCH Lab. Cas ¶ 12,441 (N.D.Ind. 1980); *Capital Parcel Delivery Co.* v. *Chauffeurs Local 150*, 105 L.R.R.M. 3351 (E.D.Cal. 1980); *Illinois ex rel. Dixon* v. *TRE Corp.*, No. 79 C 5231 (N.D.Ill., December 21, 1979); *Bailey* v. *First Fed. Sav. & Loan Ass'n of Ottawa*, 467 F.Supp. 1139 (C.D.Ill. 1979); *First Fed. Sav. & Loan Ass'n of Jackson County* v. *First Fed. Sav. & Loan Ass'n of Huntsville*, 446 F.Supp. 210 (N.D.Ala. 1978); *Guthrie* v. *Dow Chemical Co.*, 445 F.Supp. 311 (S.D.Tex. 1978); *Teamsters Local 116* v. *Fargo-Moorhead Auto. Dealers Ass'n*, 459 F.Supp. 558 (D. N.D. 1978); *New York* v. *Local 144, Hotel, Nursing Home & Allied Health Serv. Union*, 410 F.Supp. 225 (S.D.N.Y.

(Footnote continued on following page)

to allege solely state law claims for breach of contract was properly removable to the district court, pursuant to 28 U.S.C. § 1441(b), because the subject matter of the complaint was preempted by federal law. The alleged breach arose out of a collective bargaining agreement and thus, Section 301 of the Labor Management Relations Act preempted state law. This Court held that under such circumstances, the action was removable, despite the plaintiff's attempt to characterize its

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(Footnote continued from preceding page)

1976); and *Ashley* v. *Southwestern Bell Tel. Co.*, 410 F.Supp. 1389 (W.D.Tex. 1976). The following cases have found that federal preemption does not provide a basis for federal question jurisdiction: *Schultz* v. *Coral Gables Fed. Sav. & Loan Ass'n*, 505 F.Supp. 1003 (S.D.Fla. 1981); *Drivers, Local 639* v. *Seagram Sales Corp.*, 531 F.Supp. 364 (D.D.C. 1981); *349 West 57th St. Constr. Corp.* v. *Cody*, 90 CCH Lab. Cas. ¶ 12,599 (S.D.N.Y. 1980); *Long Island R.R.* v. *United Transp. Union*, 484 F.Supp. 1290 (S.D.N.Y. 1980); *Smart* v. *First Fed. Sav. & Loan Ass'n of Detroit*, 500 F.Supp. 1147 (E.D.Mich. 1980); *Sepia Trucking Co.* v. *Int'l Bhd. of Teamsters, Local 705*, No. 80 C 403 (N.D.Ill., July 31, 1980); *Turner* v. *Bell Fed. Sav. & Loan Ass'n*, 490 F.Supp. 104 (N.D. Ill. 1980); *Eure* v. *NVF Co.*, 481 F.Supp. 639 (E.D.N.C. 1979); *Glendale Fed. Sav. & Loan Ass'n* v. *Fox*, 481 F.Supp. 616 (C.D.Cal. 1979); *California* v. *Glendale Fed. Sav. & Loan Ass'n*, 475 F.Supp. 728 (C.D.Cal. 1979); *Nevada* v. *King*, 463 F.Supp. 749 (D.Nev. 1979); *Jurisch* v. *Arlington Heights Fed. Sav. & Loan Ass'n*, No. 77 C 4024 (N.D.Ill., May 26, 1978); *Borzello* v. *Charles D. Sooy & C. Darrell Sooy*, 427 F.Supp. 332 (N.D.Cal. 1977); *Oklahoma ex rel. Grimes* v. *United Health & Retirement Ass'n*, 436 F.Supp. 550 (W.D. Okla. 1977); *Johnson* v. *First Fed. Sav. & Loan Ass'n of Detroit*, 418 F.Supp. 1106 (E.D.Mich. 1976); and *Marquette Nat'l Bank of Minneapolis* v. *First Nat'l Bank of Omaha*, 422 F.Supp. 1346 (D.Minn. 1976). The following cases, while discussing the issue of preemption-based removal at length and noting the conflict in existing case law, do not reach a resolution of the issue: *Brown & Sharpe Mfg. Co.* v. *Lodges 1088 & 1142, Int'l Ass'n of Machinists*, 535 F.Supp. 167 (D.R.I. 1982); *Connecticut* v. *Levi Strauss & Co.*, 471 F.Supp. 363 (D.Conn. 1979). There are undoubtedly many more unreported decisions concerning preemption as a basis for removal.

claim as based wholly on state law.[7] This Court, noting that "[r]emoval is but one aspect of the primacy of the federal judiciary in deciding questions of federal law,"[8] held that where federal preemption was involved, federal law controlled the decision and the case became removable under § 1441(b).

More recently, in *Federated Department Stores* v. *Moitie*, 452 U. S. 394 (1981), this Court again affirmed removal of an action purportedly based on state-created rights because those rights had a sufficient "federal character to support removal." 452 U. S. at 397 n.2. In so doing this Court affirmed the district court's finding that plaintiffs could not "avoid removal jurisdiction by casting their essentially federal law claims as state-law claims." *Id.*

Justice Brennan dissented in *Moitie*, arguing that plaintiff's claims were purely state-created and not federal in character. However, Justice Brennan specifically noted that where state-created claims infringe on an area of law preempted by federal regulation, removal is appropriate.

> The general rule that a plaintiff basing his claim solely on state law thereby avoids removal applies only where state substantive law has not been preempted by federal law.
>
> * * *
>
> "[W]here Congress has explicitly said that the exclusive source of a plaintiff's right to relief is to be federal law, it would be unacceptable to permit that very plaintiff, by the artful manipulation of the terms of a complaint, to defeat a clearly enunciated congressional objective."[9]

452 U. S. at 407-408.

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[7] *See also* the decision of the Sixth Circuit where the court notes plaintiff's disavowal of any reliance on federal law. *Avco Corp.* v. *Aero Lodge No. 735*, 376 F. 2d 337, 339 (6th Cir. 1967).

[8] The Court cited *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 415-416 (1964).

[9] Quoting from *Hearst Corp.* v. *Shopping Center Network, Inc.*, 307 F. Supp. 551, 556 (S. D. N. Y. 1969).

The court below declined to follow the Supreme Court authority directly on point.[10] Consequently, granting a writ of certiorari here is necessary to protect the vitality of the Court's decisions in this important area of federal jurisdiction.[11]

III.

The Court Should Grant the Writ to Prevent Unnecessary Impairment of the Policies Underlying Federal Preemption and Federal Removal Jurisdiction

A.

The Decision of the Court of Appeals Impairs the Policies Underlying Federal Preemption and Federal Removal Jurisdiction

By denying defendant's right to remove an action which must rest on federal law because of federal preemption, the decision of the court below impairs two important federal policies underlying the preemption doctrine and the removal statute: the primacy of federal law in preempted areas, and the availability of a federal forum for litigation of claims which are grounded inherently in federal law. To preserve those policies the writ should be granted.

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[10] The court argued that *Avco* had been criticized by this Court in *Boys Mkts., Inc.* v. *Retail Clerks Local 770,* 398 U. S. 235, 244-45 (1970) and lacked vitality. (A. 10). In *Boys Markets,* however, this Court, in its opinion by Justice Brennan, merely recognized that in light of *Avco,* the Court's decision in *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195 (1962), should be reexamined. The Court's action in overruling *Sinclair,* rather than limiting *Avco,* demonstrated *Avco's* continuing force, a point ignored by the Seventh Circuit.

[11] In holding that federal preemption may not be the basis for a removal petition under 28 U. S. C. § 1441, the Seventh Circuit argued that this Court had "never faced the issue directly." (A. 9). While we believe that view stems from a misreading of *Avco, supra,* even if the Court of Appeals were correct, the absence of a decision by this Court on this important question of federal jurisdiction justifies granting a writ of certiorari, pursuant to Rule 17(c) of the Court's rules.

Despite its acknowledgment that the Atomic Energy Act preempts state regulation of radiation hazards (A. 16-18), the decision below effectively denies defendants access to federal courts to determine the scope of the preemption doctrine, as applied to a plaintiff's claim involving materials subject to NRC jurisdiction. Thus, under the decision below, whenever a plaintiff seeks recovery in an area preempted by federal law (such as the NRC's regulation of radioactive materials), it need only cast its complaint in state law terms in order to deny the defendant a federal forum for determination of the scope and effect of federal occupation of the field. This will remain the case despite a Congressional determination that excludes state regulation from the area in question.

Thus, complex and highly significant questions of federal preemption,[12] will frequently be left to determination by state courts.[13] The resulting lack of uniformity in federally preempted matters, and potential erosion of federal supremacy in regulation of radiation and other preemptive areas, should not be permitted to stand. Nor should a defendant, seeking to assert rights granted under a preemptive federal regulatory scheme, be denied access to the federal courts for determination of those rights.

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[12] *E.g.*, the scope of state power to regulate nuclear facilities, such as power plants, is presently before this Court in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm., cert. granted*, 50 U.S.L.W. 3994 (June 21, 1982).

[13] Since a state is not a citizen for diversity purposes, *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972), where a state is plaintiff, removal cannot be based on diversity of citizenship. Thus, if a state, as plaintiff, seeks to regulate areas preempted by federal law, unless defendant can remove under 28 U.S.C. § 1441, the only federal review will be in this Court, on review of decisions of state courts of last resort.

B.

The Decision of the Court of Appeals is Incorrect

Aside from its impairment of important federal policies, the decision of the Court of Appeals simply reaches the wrong analytical result. Even though a plaintiff purports to base its claim solely on state law, where the subject matter of the action is preempted by federal law, plaintiff's claim is "one arising under the 'laws of the United States' within the meaning of the removal statute. 28 U. S. C. § 1441(b)." *Avco Corp.* v. *Aero Lodge 735, supra,* 390 U. S. at 560.

The decision below allows the very conduct rejected in *Avco* and *Moitie*—attempting to defeat removal jurisdiction through artfully crafting a complaint in state-law terms, and using that action to regulate a federally preempted area. Although the State attempts to avoid reference to the Atomic Energy Act or the Nuclear Regulatory Commission in its Complaint (A. 32), a threshold scrutiny of its claim reveals that the State seeks to regulate the disposal of the radioactive by-products of the rare-earth facility now owned by Kerr-McGee. (A. 33-35). Those thorium-containing wastes are presently regulated by the Nuclear Regulatory Commission, pursuant to the Atomic Energy Act, as amended (A. 61), and the conflict between the relief sought by the State in its complaint and the NRC's regulation of radiation hazards is direct and immediate. Plaintiff's complaint seeks to require Kerr-McGee to remove all the radioactive tailings from the site. (A. 35). The NRC, on the other hand, has concluded in its draft environmental statement relating to these wastes that the preferable course of action is to encapsulate the materials on-site. (NUREG-0904).

Consequently, as in *Avco*, the plaintiff's attempt to characterize its claims as state-created is irrelevant. The wastes it allegedly seeks to regulate are inseparable from those subject to the exclusive jurisdiction of the Nuclear Regulatory Commission, and regulation of such waste is subject to federal preemption. *Northern States Power Co. v. Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U. S. 1035 (1972); *Train v. Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976). Thus, in this case, as in *Avco*, the asserted state law is supplanted by preemptive federal law. Plaintiff's claim, therefore, takes on a "sufficient federal character" to meet the "arising under" requirement of 28 U. S. C. § 1441(b), and was properly removed to the district court. *See* 390 U. S. at 560.[14]

The proper course on preemption-based removal is to determine if federal preemption applies.[15] If not, remand is appropriate. If preemption applies, the court should determine whether federal law precludes the claim asserted in the com-

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[14] One commentator has stated the rule in these terms:

> "If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court necessarily must look to federal law in passing on the claim, the case is removable regardless of what is in the pleading."

Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3722, at pp. 567-69 (1976 Ed.).

[15] Contrary to the suggestion of the Court of Appeals (A. 9), Kerr-McGee has never suggested that a defendant may sustain removal "merely by uttering the word preemption." The existence of preemption is a legal and factual question which, as Justice Brennan suggested in *Moitie, supra*, (452 U. S. at 408) requires the district court to scrutinize the complaint to determine whether the putative state claim "is actually grounded on a claim in which federal law is the exclusive authority." Under this procedure, followed by Judge McGarr below, the determination of federal preemption is rendered in a federal forum, and determination of the scope of federal court jurisdiction is not left to the state courts.

plaint. If so, the action may be dismissed.[16] If not, plaintiff may proceed to assert its federal rights. The trial court properly followed this procedure, and its reversal by the Seventh Circuit was error.

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[16] The Court of Appeals was troubled by the effect of "derivative jurisdiction" on removal based upon federal preemption. (A. 7, n.6). Derivative jurisdiction refers to the concept that a federal court on removal acquires the jurisdiction which the state court possessed. *See Lambert Run Coal Co. v. Baltimore & Ohio Railroad*, 258 U.S. 377 (1922); *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 (1943). However, every court has jurisdiction to determine its jurisdiction. *See e.g., United States v. Shipp*, 203 U.S. 563, 573 (1906); *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947). Thus, as the court in *Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers' Union*, 511 F.Supp. 1180, 1187 held, a federal court upon removal acquires (derivatively) jurisdiction to determine jurisdiction, even where federal preemption may preclude all relief for plaintiff:

> The Court finds nothing 'illogical' in holding that preemption *always* creates 'arising under' jurisdiction, even in a case where the preemptive federal law provides the plaintiff with no right to relief. The reports are certainly well stocked with cases where the plaintiff maintained an action under federal law only to discover to its chagrin that federal law afforded no remedy.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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